EDUCATING STUDENTS WITH DISABILITIES IN NONTRADITIONAL SETTINGS: CHARTER SCHOOLS, HOME INSTRUCTION, CYBER SCHOOLS & THE GED

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A note about these materials: These materials are not intended as a comprehensive review of all IDEA or Section 504 rules, dynamics or implications from the nontraditional education settings discussed. Instead, the author has attempted to identify a variety of areas of concern to assist public educators as they serve students with disabilities. References to the U.S. Department of Education will read "ED." These materials are not intended as legal advice, and should not be so construed. State law, local policy and unique facts make a dramatic difference in analyzing any situation or question. Please consult a licensed attorney for legal advice regarding a particular situation.

When a student is educated in the traditional schoolhouse… It's easy to take for granted the resources and expertise that are readily available in the traditional school. When students with disabilities are served there, educational professionals and service providers, instructional resources, a safe and ordered learning environment, and even age-appropriate peers are likely close at hand. While pursuing instruction elsewhere or through cyberspace can be advantageous for a student with a disability, it requires re-thinking the way we educate that student, from how we provide services and accomplish legal compliance to how we facilitate access to nondisabled peers. These materials attempt to analyze some of those concerns.

I. Charter Schools

A. What is a charter school?

The IDEA does not define a charter school, but instead references the definition created in the Elementary and Secondary Education Act (ESEA) at §5210(1), as amended by NCLB, as follows:

> "The term charter school means a public school that:
> 1. In accordance with a specific State statute authorizing the granting of charters to schools, is exempt from significant State or local rules that inhibit the flexible operation and management of public schools, but not from any rules relating to the other requirements of this paragraph [the paragraph that sets forth the Federal definition];
> 2. Is created by a developer as a public school, or is adapted by a developer from an existing public school, and is operated under public supervision and direction;
> 3. Operates in pursuit of a specific set of educational objectives determined by the school's developer and agreed to by the authorized public chartering agency;
> 4. Provides a program of elementary or secondary education, or both;
> 5. Is nonsectarian in its programs, admissions policies, employment practices, and all other operations, and is not affiliated with a sectarian school or religious institution;
> 6. Does not charge tuition;
> 7. Complies with the Age Discrimination Act of 1975, Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, Section 504 of the Rehabilitation Act of 1973, Title II of the Americans with Disabilities Act of 1990, and Part B of the Individuals with Disabilities Education Act;
> 8. Is a school to which parents choose to send their children, and that admits students on the basis of a lottery, if more students apply for admission than can be accommodated;

9. Agrees to comply with the same Federal and State audit requirements as do other elementary schools and secondary schools in the State, unless such requirements are specifically waived for the purpose of this program [the Public Charter School Program];
10. Meets all applicable Federal, State, and local health and safety requirements;
11. Operates in accordance with State law; and
12. Has a written performance contract with the authorized public chartering agency in the State that includes a description of how student performance will be measured in charter schools pursuant to State assessments that are required of other schools and pursuant to any other assessments mutually agreeable to the authorized public chartering agency and the charter school." *Commentary to 2006 IDEA regulations, §300.7, p. 46,548.*

B. What are a charter school's duties under IDEA and Section 504?

1. Special education duties.

The reference in the 7th characteristic to compliance with both Section 504 and the IDEA Part-B indicates that the laws will apply to the charter, but does not address the state decision with respect to whether the charter school itself is an LEA responsible for FAPE. That determination depends on state law and can vary state to state. For example, in *Letter to Gloeckler,* 41 IDELR 134 (OSEP 2003), OSEP asked New York state to explain how charter schools were treated under state law. "The starting point of analysis for determining how students with disabilities attending a charter school are provided a free appropriate public education and how a charter school may access IDEA funds or services for students with disabilities enrolled in the school, is the determination of whether the charter school is established under State law as an LEA, a school of an LEA or some other entity. The letter provides a nice summary of the IDEA duties that arise depending on the answer to the LEA question.

If the charter school is its own LEA... "[I]f the charter school is an LEA, it is eligible to receive a subgrant under the Grants to States and Preschool grants program and, under 34 CFR §300.312(b), it is responsible for ensuring that the requirements of the IDEA are met, unless State law assigns that responsibility to some other entity. Consequently, the charter (absent state law to the contrary) is responsible for its own IDEA compliance. *See, for example, IDEA Public Charter v. Belton,* 45 IDELR 158 (D.D.C. 2006)("In point of fact, the [Charter] School agrees with the District's argument that, because the [Charter] School has elected to be its own LEA, it is the [Charter] School, rather than DCPS, that bears the responsibility of providing FAPE to its special education students.").

If the charter school is a school of an LEA… "If a charter school is considered a school of an LEA, the LEA must meet the requirement of 34 CFR §300.241 to serve children with disabilities attending charter schools in the same manner as it serves children with disabilities in its other schools and to provide funds under Part B of IDEA to its charter schools in the same manner as it provides Part B funds to its other schools." *Id.* Further, like any other campus or school in the LEA, the failure of this type of charter school in any of the myriad IDEA obligations would be the responsibility of the LEA. To this end, OSEP asked New York state to provide further explanation as to how the supervisory function for compliance is handled. "If New York considers a charter school to be a school of an LEA, please explain which LEA fills that function where students of more than one LEA attend the charter school and how the requirements of 34 CFR 300.241 are being met. We note that if New York determines that a charter school is not a school within an LEA but some other entity under §300.312(d), to which 34 CFR 300.241 does not apply, the State would not be precluded from assigning responsibility to the school district of residence." *Id.*

A little commentary: Look to state law to determine whether charter schools in your state act as their own LEAs, are schools of an LEA or some other arrangement has been made (such as the state acting as LEA for charter schools).

2. Duties under Section 504.

As a recipient of federal funds, the charter school has the same Section 504 and ADA obligations as other public schools. *Boston (MA) Renaissance Charter Sch.,* 26 IDELR 889 (OCR 1997)("OCR has jurisdiction to investigate this complaint under Section 504 of the Rehabilitation Act of 1973, and its implementing regulations, (Section 504), because Section 504 prohibits discrimination on the basis of disability by recipients of Federal financial assistance from the U.S. Department of Education, and the school is a recipient."); *See also, Redlands (CA) Unified School District,* 51 IDELR 287 (OCR 2008)("As public schools, there is no basis in law for Charter schools to waive or obviate their responsibilities under Section 504 and Title II.").

B. Some Interesting Issues

1. Enrollment in Charter Schools by students with disabilities

While charter schools are growing in number, enrollment by students with disabilities remains disproportionately small. Consider the following findings by the General Accounting Office.

> "Charter schools enrolled a lower percentage of students with disabilities than traditional public schools, but little is known about the factors contributing to these differences. In school year 2009-2010, which was the most recent data available at the time of our review, approximately 11 percent of students enrolled in traditional public schools were students with disabilities compared to about 8 percent of students enrolled in charter schools.
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> GAO also found that, relative to traditional public schools, the proportion of charter schools that enrolled high percentages of students with disabilities was lower overall. Specifically, students with disabilities represented 8 to 12 percent of all students at 23 percent of charter schools compared to 34 percent of traditional public schools. However, when compared to traditional public schools, a higher percentage of charter schools enrolled more than 20 percent of students with disabilities. Several factors may help explain why enrollment levels of students with disabilities in charter schools and traditional public schools differ, but the information is anecdotal. **For example, charter schools are schools of choice, so enrollment levels may differ because fewer parents of students with disabilities choose to enroll their children in charter schools. In addition, some charter schools may be discouraging students with disabilities from enrolling.** Further, in certain instances, traditional public school districts play a role in the placement of students with disabilities in charter schools. In these instances, while charter schools participate in the placement process, they do not always make the final placement decisions for students with disabilities. **Finally, charter schools' resources may be constrained, making it difficult to meet the needs of students with more severe disabilities.**
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> **Most of the 13 charter schools GAO visited publicized and offered special education services, but faced challenges serving students with severe disabilities."** *Highlights from GAO-12-543, Charter Schools: Additional Federal Attention Needed to Help Protect Access for Students with Disabilities, June (2012)(emphasis added).*

2. Knowledge/sophistication with respect to compliance issues

Both IDEA and Section 504 require knowledge of the requirements and some sophistication to ensure proper compliance. Charter schools have their share of losing cases on issues of compliance, with losses pointing to gaps in understanding rather than factual disputes decided in the parent's favor. Consider the following examples.

Prevail Academy (MI), 109 LRP 32521 (OCR 2009). A Section 504-eligible student with asthma and a severe peanut allergy transferred to the Academy with a Section 504 Plan. Seven months after the

student's parent requested that the Academy follow the plan or conduct a §504 evaluation and create a plan, the Academy finally conducted a Section 504 evaluation. The Section 504 Committee, comprised of the principal and two teachers determined that the student did not have a physical or mental impairment. OCR found the Academy's evaluation in violation of Section 504.

> "Specifically, the principal and one of the student's teachers acknowledged that, when they assessed the student, they did not obtain any current medical or other information regarding the student's particular medical condition and circumstances or any records from her previous school to assist them in determining whether the student has a medical impairment that substantially limits one or more major life activities or how the impairment affected the student's ability to participate at school. Rather, the 504 Committee considered anecdotal information based on the two teachers' observations of the student and reviewed the information complainant submitted at the beginning of the school year, which did not include any medical documentation or records from the student's former schools. With respect to its determination, the principal told OCR that the 504 committee found that the student did not suffer from a physical or mental impairment because she was progressing in her academics, had good attendance, seemed healthy at school, and had good stamina."

Further, **one of the teacher's told OCR that the student could not have a physical or mental impairment because "peanut allergies" was not among the impairments listed on the Academy's evaluation form.** Despite the parent's offer to sign a medical release form, the school did not seek to review any medical data, and didn't look at data from previous schools, but denied eligibility anyway. OCR determined that the school failed to draw upon data from a variety of sources (among other problems) and "did not properly understand how to determine whether the student has a physical impairment[.]"

Redlands (CA) Unified School District, 51 IDELR 287 (OCR 2008). Among other errors, a charter school failed to follow the manifestation determination procedures required by the LEA school district's policy, apparently due to confusion or limited understanding of MDR.

> "The evidence shows that the IEP team based its determination that the Student's behavior was not a manifestation of her disability on the opinions of the RSP teacher and school psychologist that the Student could perceive the difference between right and wrong. This is a different standard than the District's standard for determining whether behavior is a manifestation of a disability and it is not an appropriate standard under Section 504 and Title II for making a manifestation determination."

By way of resolution agreement, the District LEA obligated itself to greater supervision of its charter. Specifically, the charter "will notify the District of all special education students it has referred for expulsion, pre-expulsion or suspension(s) lasting cumulating in 10 days of removal;" "a District special education representative will participate in all manifestation determination meetings and ensure that notice of procedural safeguards is provided to the student's parent/guardian"; "a representative of the District is involved in all charter IEP processes"; the charter "will adhere to the District's special education policies and procedures, including the standards for determining whether a student's conduct is a manifestation of the student's disability;" and the "District special education office will train School staff on conducting manifestation determination meetings." *See, also, Seashore Learning, discussed below.*

3. Services & Duties

IDEA-eligible children who attend charter schools retain all of their IDEA rights. In *Letter to Anonymous,* 53 IDELR 129 (OSEP 2009), OSEP advised that the special education experience of a student in a charter school is the same as that in a regular public school, including, for example, the availability of a continuum of educational placements. "Regardless of whether a public charter school is: (1) a school of the local educational agency (LEA) that receives funding under 34 CFR § 300.705;

(2) an LEA that receives funding under 34 CFR § 300.705; or (3) not a school of the LEA that receives funding under 34 CFR § 300.705 or an LEA that receives funding under 34 CFR § 300.705, children with disabilities who attend public charter schools and their parents retain all rights under Part B of IDEA. 34 CFR § 300.209(a). Accordingly, the provisions in 34 CFR § 300.115 regarding the availability of a continuum of alternative placements apply to public charter schools."

What if the charter has a hard time keeping positions staffed? *Letter to Ban,* 45 IDELR 17 (OSEP 2005). Just as the public school is required to provide FAPE (and marshal the necessary personnel and resources to do so) so to is the charter school. Here, OSEP requested information from a state with respect to "whether a free appropriate public education (FAPE) was made available to students with disabilities enrolled in certain public charter schools with personnel vacancies and, if not, whether any students with disabilities that attended those public charter schools are entitled to compensatory services[.]").

Available resources. Consider this rather stern rebuke in Texas hearing officer's decision involving the provision of FAPE to a ten-year old student with cerebral palsy and a learning disability. *Seashore Learning Center Charter School,* 32 IDELR 224 (SEA TX 1999).

> "Petitioner alleged that Seashore failed to appropriately implement Jason's IEP due to the presence of numerous architectural barriers that prevented Jason from having equal access to various school facilities. Petitioner also alleged that Seashore failed to provide the related services of occupational therapy as scheduled. Petitioner alleged that Jason's learning disability forced his parents to secure the services of outside professionals to have his disabilities in math and reading diagnosed. Petitioner alleged that Seashore violated the Child Find provisions of IDEA, and were aware of Jason's disabilities but failed to adequately follow up on his need for services by conveying the needs at Jason's ARD [IEP Team] meetings…. Unfortunately for Jason, this is a very clear-cut decision. Petitioner met all burdens of showing that Seashore has failed, in good faith, to satisfy its statutory obligation under IDEA to provide Jason with a free and appropriate public education. **The Hearing Officer is aware that Seashore is a relatively new facility that has certain substantial start up costs and limited resources, though these facts standing alone would not relieve of Seashore of its obligation to provide Jason with a free and appropriate public education." (Emphasis added).**

A little commentary: Where the charter school is both its own LEA and is also just starting out, it may find itself unable (or here, unwilling) to meet its IDEA obligations. Unfortunately, the IDEA duties do not change based on the years a school has been in operation or the size of its budget.

4. Expulsion back to another public school? Another area of common misunderstanding is the responsibility of the charter school to provide services to special education students after ten days of disciplinary removal. "After a child with a disability has been removed from his or her current placement for 10 school days in the same school year, during any subsequent days of removal the public agency must provide services to the extent required under paragraph (d) of this section." 300.530(a)(2). Specifically, the common dynamic (per both school district and SEA reports to the author) is that the charter school expels the student, and advises the parent to enroll the student in another public school without arranging for services owed by the LEA during the change in placement. Such action ignores the responsibility of the charter (either as its own LEA or on behalf of the LEA district that oversees it compliance) to provide the required services.

II. Home Instruction (not to be confused with "homeschool")

First, a disclaimer is required. In fairness, discussing instruction at home under the topic of nontraditional settings is not entirely accurate, as the home was a *very* traditional place for instruction prior to public and private schools. A very robust home school community continues this tradition. These materials do not

address homeschoolers (students not enrolled in the public schools by parent choice, and taught at home by parents or in cooperative arrangements between parents). Our focus will be on students with disabilities receiving instruction from the public school in the home environment.

A quick note on terminology: Despite the IDEA utilizing the term "home instruction" to describe a placement on the continuum, some states replace the term with "homebound instruction," and worse, *use the same term* to describe instruction at home available on a temporary basis to students who are not special education eligible.

A. Background & Eligibility due to need for home instruction

1. Home instruction for IDEA-eligible students. "Home instruction" is a term of art, used by the IDEA regulations to refer to a special education instructional arrangement or setting. It is not to be confused with the phrase "home-based" services, which typically describes a student who while confined to his home, is provided access to materials, assignments, etc, but gets no direct instruction. The federal regulations specifically identify home instruction as part of the continuum of placements for the IDEA-eligible student. 34 C.F.R. §300.115. State law and regulation will likely provide parameters for delivering instruction at home under IDEA, but those rules are not discussed here. Consult your school attorney to discuss the impact of these rules.

Home instruction comes with serious least restrictive environment (LRE) repercussions. **"Home instruction is, for school-aged children, the most restrictive type of placement because it does not permit education to take place with other children.** For that reason, home instruction should be relied on as the means of providing FAPE to a school-aged child with a disability only in those limited circumstances when they cannot be educated with other children even with the use of appropriate related services and supplementary aids and services, such as when a child is recovering from surgery." *DOE Commentary to Subpart E, §300.551 (1997 IDEA Reauthorization)(emphasis added).* Similarly, the 9th Circuit found that "Hospitalized and homebound care should be considered to be among the least advantageous educational arrangements [and are] to be utilized only when a more normalized process of education is unsuitable for student who has severe health restrictions." U.S. Department of Education, *Program Standards and Guidelines for Special Education and Special Services, Programs and Services for the Orthopedically Handicapped and Other Health Impaired, aqi, Department of Education of Hawaii v. Katherine D.,* 727 F.2d 809, 818 (9th Cir. 1983), *cert. den'd,* 471 U.S. 1117 (1985).

The IEP Team must ask whether the eligible student's needs can be met at school. If so, homebound simply is not the LRE. The Ninth Circuit concluded that the school's offer of homebound services consisting of one and one half hours of speech therapy and forty minutes of parent counseling a week (and no academic instruction) was not FAPE. The school argued that the student's medical needs created demands that it could not meet in the school. The student had cystic fibrosis and tracheomalacia which required a tracheostomy tube to allow the student to breathe. The school's argument was undermined by the student's success at a private school where her mother placed her after rejecting the offered homebound. Further undermining the district's claims was the district's offer of an IEP at the public school for the following year. Agreeing with the district court, the Ninth Circuit found that homebound instruction was not the LRE, and was thus inappropriate. *Katherine D.,* supra.

2. Section 504 & the Student Served at Home. Home Instruction or some similar label is also used to describe services at home for Section 504 eligible students. Note that under Section 504, a student's physical or mental impairment that requires him to be educated at home, while not automatically creating Section 504 eligibility, does trigger the school's duty to refer the student to Section 504 for evaluation. *See, for example, Lourdes (OR) Public Charter School,* 57 IDELR 53 (OCR 2011). Lacking appropriate staff and a health plan to address the medical needs of a student with diabetes, the school placed the student on homebound instruction. OCR determined that this was

a significant change of placement for a student because of a physical impairment, requiring a Section 504 evaluation first. In essence, the school knew of the impairment and the resulting need for services. Thus, the school had a duty to conduct a Section 504 evaluation before it could place the student on homebound instruction. "Further, because LPCS placed the student in an in-home tutoring environment, which was a more restrictive environment than what the student had previously and subsequently been provided, LPSC failed to comply with [the Section 504 LRE requirement at] 34 C.F.R. §104.34(a)."

B. Is the student confined to the home? Can he be taught at school?

Although the questions are clearly different they are both tied together in a mix of medical/mental health data (for example, in what condition do we find the child and is he physically and mentally able to go to school?) The LRE analysis ought to be a serious examination of the limitations on the student's attendance. For example, if because of the medical condition the student lacks the stamina to attend all day, is a shortened school day possible? What about providing the student with a place to rest at school when needed? In other words, can the student's lack of stamina be accommodated at school in ways rather than in a disfavored placement? Flexibility in delivering services can take the pressure off of the IEP Team to make inappropriate or unnecessary home instruction placements. In short, the IDEA-eligible student with limited stamina is not automatically taught at home. Likewise, if the student could continue to progress with access to the curriculum/materials and assignments and have teachers available by phone for questions, homebound may not be necessary. Finally, allegations of home confinement must be viewed in the context of other activities engaged in by the student outside school hours. *See for example, Calallen ISD v. John McC.,* Docket No. 132-SE-1196, p.7-8 (SEA Tex. 1997)("Some students need continuous homebound services. John is not among them. One is hard pressed to justify continuous homebound services for a student who drives the family car, goes out on dates, and regularly participates in other activities outside the home."). *See the related discussion below on home instruction students participating in extra-curricular activities.*

1. Students can be confined to the home for any number of disability related reasons. A couple of examples:

Post-concussion syndrome. *Mt. Zion Unitary Sch. Dist.,* 111 LRP 51317 (SEA IL. 2011). While "most people who are diagnosed with a concussion recover relatively quickly after the trauma with quiet and rest, people with PCS have concussion symptoms which continue for an extended period of time." The student's doctor testified that both physical and cognitive stimuli can exacerbate his condition. Consequently, "the stimuli of a regular classroom and school setting would almost certainly cause a deterioration of Student's physical condition given the stimuli of a normal school environment." Finding that there is no safe way to educate the student in any classroom with other students and no accommodations can reduce the risk (with the exception of removing all other students from the classroom), "the only reasonable placement at this point in time is a homebound placement."

Poor body temperature regulation. *New Jersey Dept. of Educ. Complaint Investigation C2012-4341,* 59 IDELR 294 (N.J. Sup. Ct 2012). The student "has a neo-natal encephalopathy with severely compromised post-natal growth and neurological development. Because of his brain defect, T.S. has poor temperature regulation and must be in an environment that is 77 degrees Fahrenheit or higher so that his core body temperature remains about 96.5 degrees." The district argues that home placement is inappropriate because it is not the LRE, despite a finding by the State Office of Special Education that the home was the most controlled/controllable environment." "The district states that T.S. was initially placed at the Children's Therapy Center and removed from that program because of medical concerns, not because the program was deemed inappropriate. However, as the record indicates, the Children's Therapy Center program was deemed inappropriate because that program could not meet T.S.'s need for temperature stability." There being no evidence that the student's medical health can

be maintained in a less-restrictive setting, the district is ordered to provide 10-hous per week of home instruction.

And sometimes they're not sufficiently confined…

Doctor's notes and home instruction. A common requirement in state law is that a medical doctor certify that the student is unable to attend school. The doctor's opinion, however, does not make the ultimate determination of LRE. A few cases and OSERS guidance look at how the doctor's opinion is utilized in the placement decision.

The IEP Team makes the call. *Questions and Answers on Providing Services to Children with disabilities During the H1N1 Outbreak,* 53 IDELR 269 (OSERS 2009). "It has long been the Department's position that when a child with a disability is classified as needing homebound instruction because of a medical problem, as ordered by a physician, and is home for an extended period of time (generally more than 10 consecutive school days), an individualized education program (IEP) meeting is necessary to change the child's placement and the contents of the child's IEP, if warranted."

See, also Marshall Joint School District #2 v. C.D., 54 IDELR 307, 616 F.3d 632 (7th Cir. 2010)("a physician's diagnosis and input on a child's medical condition is important and bears on the team's informed decision on a student's needs…. **But a physician cannot simply prescribe special education;** rather, the Act dictates a full review by an IEP team composed of parents, regular education teachers, special education teachers, and a representative of the local education agency[.]").

Four months of absences and a doctor's note for homebound. *Rockford Sch. Dist. #205,* 108 LRP 42815 (SEA Il. 2008). *Rockford* is instructive on a variety of common issues. A lengthy excerpt from the case provides the factual support for the hearing officer's decision to reject homebound instruction as an option for this student with autism.

> **"The note thus refers to the student's autism, but that is a disability with which the student had long suffered, and it had not prevented him from attending school.** The note also refers to the student as 'having been more depressed and not comfortable at school,' which are not illnesses requiring absence from school at all, but merely descriptive of the student's moods at school. It also refers to the student's 'current illness,' but what this 'illness' was—and whether it is any different from the student being 'depressed and not comfortable at school' or different from the student's 'autism'—is not identified or described or otherwise documented. **This officer finds, in any event, that the February 14 note from Dr. Danko did not document any illness or condition that required the student to be absent from school for even one day, much less for more than four months.** In any event, it is extremely doubtful that C.S. suffered from any illness requiring his extended absence from school (i.e. his absence from school for other than during the first week or so of February 2008). The lack of any medical documentation of such an illness—submitted to either the District or 'retroactively' at the hearing to this officer—supports that conclusion. So does the mother's own testimony, for while the matter of her son's medical treatment was raised with her at the hearing, she did not testify that she even sought professional medical assistance for C.S. at any time after February 1, 2008 (other than from Dr. Danko, on February 7, 2008). **Yet, if her son, had truly been suffered from an extended illness during the last four months of the school year, serious enough to keep him out of school, this officer would expect her to have sought just such assistance, and been eager to testify about it.**
>
> Petitioners solicited the February 14 letter from Dr. Danko for a different purpose that to provide medical documentation of C.S.'s illnesses requiring C.S.'s absence from school. The letter is thus framed in terms of a joint request for home-bound instruction. It says that R.S. had 'requested' of Dr. Danko a recommendation for home bound instruction. Then, Dr, Danko, implicitly invoking C.S.'s 'autism,' his 'depression' and [dis]comfort[ ]' at school, and his unspecified 'current illness,'

himself requests that C.S. 'receive homebound services for the remainder of the year.' **Whether this request is based on the independent judgment of Dr. Danko that the provision of such services was medically appropriate, or he was merely being responsive to R.S.'s request to him, is unclear from the text of the letter, and Dr. Danko did not testify in the matter, so this officer has no way of knowing what his views are on the matter." (Emphasis added).**

Upon review of the data, the Hearing Officer concluded that the school's IEP was appropriate and that "For the District to have permitted home bound instruction for the student, when the nature and severity of his disability, as medically documented, did not even remotely suggest that he could not achieve satisfactory educational progress in the regular classroom, with the assistance of his assigned paraprofessional and the provision of other services, would have violated IDEA."

A little commentary: The case, while an extreme example, does illustrate the dynamic of parents who either are unwilling or unable to get the student to school and the impact of school demands that parents provide medical documentation for purposes of compulsory attendance. The possibility of truancy filings in the absence of documentation prompted the parent to claim that the student was enrolled in another school. Wrote the Hearing Officer: "The mother committed a fraud upon the District, and did a profound disservice to her son educationally, by purporting to withdraw him from the Rockford Public Schools in order to enroll him in Education Choice School, when there was no school by that name, but only a mail box drop at the address shown for the school."

A problem schools encounter in this situation is that the school believes the student should attend and plans the IEP accordingly, but the parents refuse to send the student, relying on the doctor's recommendation for home instruction. Should the school pursue truancy when the student's attendance so requires, a judge may be less than sympathetic to the school's position in the absence of medical data that the student can actually attend. To better prepare for such a situation, the school will need to document why, despite the doctor's recommendation, the student is able to attend. For example, what does the student do outside of school hours? Does he have a job, go on dates, spend time in the community? This type of data can certainly raise a court's suspicions as to the medical need for the student to be taught away from school.

No health-based need for home instruction due to immune deficiency. *Stamps v. Gwinnett County School District,* 59 IDELR 1 (11th Cir. 2012), *cert. den'd,* 112 LRP 54652 (2012). The school's refusal to educate three siblings at home, and creation of school placements for them was upheld by the court based on good data with respect to the impact of the students' impairments.

"The administrative law judge did not clearly err in finding that the programs devised by the district are reasonably calculated to provide the children an adequate education in the least restrictive environment and that the children are capable of attending public school. Dr. Batlle's testimony did not establish that H.S., S.S., and J.S. had to be educated at home because they had a nonspecific immune deficiency. Batlle testified that the children's immune deficiency did not require preventative treatment, they did not have a 'bonafide primary immune deficiency,' their immune systems '[would] improve just like anybody' with age, and the children had not been sick in several years. Batlle's testimony was consistent with the opinion of an expert in pediatric infectious diseases who, after reviewing the children's medical records and speaking briefly with Batlle, found that **the children 'would have the same probability of getting sick' as other children** and that, because 'they did not have any severe or unusual infections,' they should not have 'any restrictions on their socialization activities, be it school or going to community functions.'" (Emphasis added).

Homebound for a student with weeks of disability-related absences? Not necessarily. *Timothy G. v. Mansfield ISD,* 405-SE-697 (SEA TX 1998). In this Texas case, the Hearing Officer was presented with a student with ADHD and asthma that qualified him under the IDEA as Other Health Impaired (OHI). Although the decision alludes to a minor learning disability, the student was enrolled in all regular classes and was performing well. The parent was concerned about the student's absences

arising from asthma. In the last year, the student had missed four weeks of school, two to three days at a time. The absences were spread out over the entire school year. On those days, his asthma was especially strong, resulting in fatigue, wheezing, a tight chest and difficulty breathing. His teachers report that upon returning to school, he has always been able to quickly catch up with his make-up work. The parent demanded that the IEP include homebound instruction whenever he was absent for more than three days. The Hearing Officer found no need. "Petitioner's request for homebound services is not justified or reasonable. While Timothy's absences due to illness are unfortunate and appear to be somewhat excessive, the duration of each absence is usually only two to three days. Moreover, Timothy appears to be able to make up any missed work after he is able to return to school. Each of Timothy's teachers appears to be willing to assist Timothy in the completion of work missed due to his absences." *Id., at 8.* In short, the parent's request for homebound was denied because "there is no concrete basis to change the educational plan under which Timothy appears to be flourishing." *Id., at 9.* That's Hearing Officer-speak for "the student has no educational need for more restrictive homebound services."

No home instruction required when, with supports, the student can be taught at school. *Brado v. Weast,* 53 IDELR 316 (D. Md. 2010).

> "Molly, to be sure, suffers from chronic pain and fatigue which likely inhibit her ability to concentrate and to complete tasks. The record is clear as to her need for frequent breaks, adjusted workloads, alternative test scheduling, and personalized instruction. The point, however, is that these modifications to Molly's instruction can all be obtained through Rehabilitation Act accommodations. 29 U.S.C. § 794. Both the medical expert testimony as well as the educator testimony, as reviewed by the ALJ, indicate that Molly requires only accommodations. Not one HHT educator witness testified that Molly required special education. Nor did the psychological or the educational assessments that Molly underwent in 2006 indicate a need for HHT [Home Hospital Teaching Program]. While the medical doctors and psychologists all agree that Molly suffers from some sort of pain disorder, with the exception of Molly's primary care physician, Dr. Foxx, no medical expert suggests that Molly required HHT. Although Molly may have been provided with HHT for two years, the record does not establish that the earlier determinations by the IEP teams were well grounded."

A little commentary: The case makes the point that not only does the student not need instruction at home (as supports at school can adequately address her needs in a less restricted setting), but the services she requires are not special education, and are available under Section 504.

C. Which services (and how much) are required?

Are full-day services required in home instruction? No. *Renton Sch. Dist.,* 11 LRP 72136 (SEA WA. 2011). In response to parents' objections to the adequacy of home instruction (the district offered 90 minutes per day), the Hearing Officer provides the following review of authority and notes no authority for the proposition of a requirement for full-day instruction.

> "There is no requirement that homebound instruction be for the full school day, nor that it provide the same number of special education minutes the student received while attending school…. *See Georgetown Independent School Dist,* 45 IDELR 116 (SEA TX 2005) (6 hours per week, increased to 15 hours per week, provided FAPE to high school student on homebound instruction due to aplastic anemia); *Montrose County School Dist.,* 37 IDELR 207 (SEA CO 2002) (district provided 4.5 to 6 hours per week of homebound instruction in a library to 12 year old with emotional disabilities, and student made some academic progress; FAPE was denied not due to number of hours, but because instructor had never seen the student's IEP and did not address its goals); *Greenville Independent School Dist.,* 102 LRP 12471 (SEA TX 2001) (homebound instruction given to high school student with multiple physical and emotional disabilities was appropriate; 'Clearly, homebound instruction is

a reduced version of weekly classroom instruction. Where the typical ninth grader at Greenville High School might spend thirty or more hours per week in classroom instruction, would have eight hours per week of instruction.'); *Independent School Dist of Boise,* 35 IDELR 147 (SEA ID 2001) (district provided two hours per week of home bound instruction at a library to 7th grade student with emotional disabilities, with goal of transitioning her back to school in 6 to 12 months; FAPE was provided); *East Stroudsburg School Dist.,* 30 IDELR 211 (SEA, PA 1999) (two hours per day of compensatory instruction awarded for each day a 7th grade student received no homebound instruction when he was psychiatrically unable to attend school)."

Can the school just provide the state-required minimum? Many, if not all states, have established some sort of floor for the minimum number of hours a student can receive home instruction (this floor may be tied to funding the placement). The state minimum is not a "safe harbor" as the level of services to be provided a student under IDEA should be individualized and determined by the IEP Team. *See, for example, Torrance Unified Sch. Dist.,* 111 LRP 19380 (SEA CA. 2011)("For a school district's offer of special education services to a disabled pupil to constitute a FAPE under the IDEA, a school district's offer of educational services and placement must be designed to meet the student's unique needs and be reasonably calculated to provide some educational benefit in the least restrictive environment….Given the severity of Student's needs, five hours per week of home instruction was simply not a FAPE."); *In re Student with a Disability,* 111 LRP 5952 (SEA CT 2010)("The haphazard homebound instruction offered by the Board, contracted out and lacking appropriate supervision and documentation, failed to address Student's needs." As compensatory services, the Hearing Officer ordered "an appropriate long-term homebound program must include all the classes and services for which Student is eligible, and may not be limited by the ten hours a week regulatory minimum.").

Does the student's condition have any bearing on the amount of home instruction services (or the time of day services are provided)? Of course. *Abington Heights School Dist.,* 112 LRP 16163 (SEA PA 2012).

"The number of hours of instruction provided to Student was based on the District's formula for educating both regular education and special education settings in the home setting when necessary. **No consideration was given to determining whether 10 hours of weekly instruction, delivered in two hour blocks in the late afternoon, is reasonably calculated to assure meaningful progress for Student, given the significant physical conditions that adversely affect Student's strength and ability to attend to instruction.** The District also gave no thought to assuring that Student had access to the content areas of the general education curriculum, such as science and social studies, despite the opinion of the teacher who provided Student's instruction for three years that Student would benefit from such instruction if provided earlier in the day. The District apparently believes that the difficulty of providing instruction other than after regular school hours relieves it of the obligation to provide instruction in all areas of the curriculum."

A little commentary: In situations where the student, because of the very condition that confines him to the home, cannot participate in instruction (or can do so in only a limited manner), the IEP Team should consider alternatives such as extended school year or additional hours when the condition improves. *See, also, In re Student with Disability,* 111 LRP 59292 (SEA CT 2011)("While it is agreed that the Student can currently manage two hours of instruction on a good day with homework on her own, if her condition improves she would benefit from an increased amount of tutoring in preparation for a return to school.").

Are other services required in addition to home instruction? As a general rule, if it's on the IEP prior to the student going into home instruction, it should be the subject of IEP Team discussion. *See for example, Cincinnati City Sch. Dist.,* 111 LRP 67197 (SEA OH 2011)("The student was receiving occupational therapy and physical therapy during the previous IEP, however, once the student was placed on home instruction those services were removed due to home instruction. If the IEP team believes that the student requires occupational therapy and physical therapy the IEP team must include

these services regardless of the student's placement on home instruction."). Further, where there are barriers that prevent the student's receiving benefit from home instruction, the barriers should be addressed as well. *See, for example, Torrance Unified, supra,* (absence of mental health services contributed to inappropriateness of home instruction services);

Does home instruction have to be provided in all of the student's classes or just core curriculum subjects? A Connecticut hearing officer answered the question by reference to §300.10 defining core academic subjects (by reference to the ESEA). Commentary to this provision ties it to the duty with respect to annual IEP goals. "As required in § 300.320(a), each child's IEP must include annual goals to enable the child to be involved in and make progress in the general education curriculum, and a statement of the special education and related services and supplementary aids and services to enable the child to be involved and make progress in the general education curriculum." Said the Connecticut hearing officer "Section 34 C.F.R. 300.10 lists core academic subjects: English, reading or language arts, mathematics, science, foreign languages, civics and government, economics, ails, history and geography. It appears that the Board has no legal basis for refusing to provide Spanish instruction within a homebound program." *In re Student with Disability,* 111 LRP 59292 (SEA CT 2011); *See also, Zachariah M. v. Greenville ISD,* Docket No's 108-SE-1101, 357-SE-0801 (SEA Tex. 2002)("Clearly, homebound instruction is a reduced version of weekly classroom instruction. Where the typical ninth grader at Greenville High School might spend thirty or more hours per week in classroom instruction, Zachariah would have eight hours per week of instruction. Accordingly, the homebound teachers had to focus on the main points of the lessons while implementing the required modifications and allowing for the plethora of missed sessions. Zachariah's complaints about his homebound services are without merit.").

Does the school have to make up homebound sessions missed by the student? No. While compensatory education requirements will apply to the school that fails to provide services resulting in a denial of FAPE, where the services were available and the student was not present to be served, there is no duty to makeup the services. *Zachariah M. v. Greenville ISD,* Docket No's 108-SE-1101, 357-SE-0801 (SEA Tex. 2002). Note that where the missed sessions are due to the disability itself, and are substantial because of the number and timing of treatments, for example, the safe position for the district would be to reschedule.

A little commentary: Just because a student is no longer in attendance at the campus does not necessarily change his state-law compulsory attendance duty. Consequently, students on home instruction who frequently miss services (the student is not at home, refuses to come out to be taught, etc,) are conceivably still subject to truancy actions. Of course, where the homebound teacher is prevented by either student or parent from providing the required instruction, an IEP Team meeting should also be called to discuss the issue and resolve the barrier to instruction.

Staff safety. *Wake County (NC) Schools,* 393 IDELR 373 (OCR 2003). The parent complained that her student had been denied homebound services pending the identification of a residential facility. The student is a 20-year old with autism and obsessive compulsive disorder. "District records indicate that the Student has attended four different high schools and during this time was involved in at least nine incidents that resulted in him physically harming a staff person and/or student, breaking a staff person's nose; and slapping a visiting parent, etc."

> "The IEP team also determined that the District could not provide homebound services to the Student pending residential placement because it could not ensure the safety of staff in his home. The number and seriousness of assaults over the past few years was the basis for the IEP team's decision to deny him homebound services and place the Student in a residential facility. Additionally, according to the District, the complainant had informed District staff that the Student recently had attacked her at home resulting in the police being called."

During the manifestation determination meeting, the IEP Team also determined that it would provide compensatory education for education missed between his removal from school and placement in a residential facility (as no home instruction as offered). The district immediately began its search for an appropriate residential facility.

> "Based on the evidence presented, it appears that the District's concerns about safety of staff and students, as well as the Student were reasonable, particularly given the incidents listed by the District. The District has made reasonable efforts to find an appropriate residential placement and actively involved the complainant in this process. In addition, the District has agreed to provide compensatory services for the period of delay in finding an appropriate placement."

No violation was found.

A little commentary: The argument can likewise be made that where the student cannot be safely instructed in the home or where the home environment cannot be made suitable for instruction, the home instruction can occur at other agreed locations.

D. Transition back to school

Home instruction is restrictive. What are you doing to get the student back to school? *See for example, Abington, supra. "*Clearly, [due to] Student's physical/neurological conditions and anxiety, and the many years of instruction in the home, it is not feasible to meet the LRE goal of instruction in a regular classroom, or in any public school placement at present. That does not mean, however, that the District is justified in keeping Student in a very restrictive placement forever. Although the District expressed a vague aspiration to return Student to school, the District acknowledged that it never considered evaluations or services to address Student's needs in the areas of social skills and anxiety. **It is difficult to understand how the District could have any realistic or reasonable goal for developing a less restrictive placement without addressing any of the significant issues that currently require a very restrictive placement for Student in order to receive even the minimal educational services the District has been providing."** (Emphasis added).

Length of homebound exceeds the need/failure to promptly return or transition a student back to school. Where an acute or chronic medical condition is the reason for the student's placement on homebound, it seems only rational that when the condition ends, so too does the need for services at home. Assuming that the original homebound placement was appropriate, the LRE considerations that allow a home placement to occur evaporate when the student's condition requiring home services goes away. Just as an inappropriate placement in homebound is problematic, so too is the placement that never ends. "A homebound placement is among the most restrictive placements. On medical grounds, school districts may provide homebound services only when a student is confined to home or hospital for documented medical reasons. Furthermore, when such services are no longer medically necessary, school districts should cease providing them." *Calallen ISD v. John McC.,* Docket No. 132-SE-1196, p.7-8 (SEA TX. 1997).

A little commentary: Due to the LRE concerns inherent in home instruction, and the inertia that can set in over time with respect to school efforts to return the student to school, schools should consider discussing transition plans and services to return the student to school at the very meeting where home instruction is ordered, and every meeting thereafter until the student is returned.

Half-day school placement. *Windsor (VT) Southeast Supervisory Union #52,* 38 IDELR 195 (OCR 2002). Student's accommodation plan called for half-day attendance for the remainder of the school year due to the student's temporary disability arising from a surgery. Despite the half-day placement, the student wanted to attend full-time, and came back to school over the parent's objection. Based on the student's apparent ability to attend and perform full-time, the 504 Coordinator informed the parent

that it seemed that some of the accommodations (notably half-day attendance) were moot. The parent complained to OCR that the district refused to implement the half-day program. OCR rejected the argument, finding that the school was prepared to implement the half-day program, but that the program simply could not be implemented once the student started attending full-time.

E. School Phobia

School phobia and homebound. *Jason B., et. al., v. Floresville ISD,* Docket Nos. 043, 044, 045-SE-1093 (SEA Tex. 1993). Following an incident on the school bus, the parents of three special education students refused to return them to school, and sought homebound services. The rationale for homebound was post traumatic stress disorder, major depression and school phobia arising from the bus incident. Prior to the next school year, the IEP Team met for each of the three, and proposed a transition back to school. The school likewise took other steps to reduce the possibility of a recurrence of trouble on the bus. The students did not return as scheduled, prompting the school's filing for due process and an order that the IEPs were appropriate and proposed services in the LRE. The Hearing Officer concluded that the IEPs were appropriate and that by keeping their students at home, the parents had "denied the district the opportunity to implement the agreed upon measures." While the parents' concerns were understandable, "a risk-free school environment is neither attainable nor required.... From the Hearing Officer's perspective... depriving children of educational services for such extended periods of time was not in their best interests.

See also, Bradley v. Arkansas Department of Education, 45 IDELR 149, 443 F.3d 965 (8th Cir. 2006)(IEP Team rejected parent request for homebound on the basis of one-page report from psychologist diagnosing student with school phobia. The team believed that student's socialization needs would not be met at home, and that the home was not the LRE. The school asked for additional information, and the opportunity to pursue a second opinion. Both requests were rejected by the parent, who then refused to send the student to school. A truancy court ordered the parent to return the student to school. No retaliation found for the truancy filing, as the principal only did what state law required him to do. The principal had actually even delayed filing against the parent in order to try to work out the matter as the principal knew that a truancy filing would further sour the parent-school relationship).

But see, Greenbush School Comm. v. Mr. & Mrs. K., 25 IDELR 200, 949 F.Supp. 934 (D. Maine 1996)(Student ostracized and persecuted in his resident school system sought placement in a neighboring school system. The district court found that a student's "gripping fear" of a particular school, together with parental hostility, can prevent a student from receiving educational benefit there, and would make education there inappropriate).

A little commentary: An important point made in *Oak Park* is that waiting for school phobia to subside is not a good strategy. "In contrast to normal school anxieties which tend to alleviate over time, school phobia becomes worse the longer the individual stays ways from school. According to the report it was important to treat Student's school phobia aggressively, with the most immediate goal being to get Student back into the classroom as soon as possible." *Oak Park & River Forest High School District #200,* 34 IDELR 161 (SEA IL. 2001).

F. A few miscellaneous Home Instruction Issues

Can a student be too impaired to come to school, but *not* too impaired to participate in a school dance? *Logan County (WV) Schools,* 55 IDELR 297 (OCR 2010). The problem at issue here was a policy with no exceptions. "The Policy categorically denies students who are placed on homebound instruction, including students with a disability who are placed on homebound instruction because of their disability, the opportunity to participate in extracurricular activities." Strangely, the policy prevented attendance at dances and parties, but did not prevent students on homebound from attending

basketball and football games "since they are paid events and open to the public." Due to his homebound placement because of Fabry disease (a hereditary metabolic disorder), the student at issue in this complaint was denied the opportunity to participate in the senior party. OCR found this exclusion from participation in extracurricular activities on the basis of disability a §504 and ADA violation. The claims continue in federal district court, where the court refused to dismiss the student's Section 1983 claims. *Mowery v. Logan County Board of Education,* 58 IDELR 192 (S.D. W.V. 2012).

A little commentary: The case raises a common refrain: if the student is too impaired to come to school, is he not too impaired to go to a senior party/dance? Apparently OCR's take is "not necessarily." The main concern here was the categorical exclusion without any individualized analysis of the student's unique situation. Could the school require that, where a medical professional has opined that the student cannot attend school, a medical professional must provide a release indicating that attending the dance is medically appropriate? And could the school then argue that perhaps some attendance at school is also now appropriate as the student is no longer confined to the home? A final note, OCR also determined that the school's placement of the student on homebound was a significant change in placement ("as it changed the type, nature, length and duration of the education program he received when not on homebound instruction") and should have been preceded by a Section 504 evaluation.

Home instruction as the Interim Alternative Education Setting (IAES) during discipline. Under IDEA, educational services must be provided to the special education student after ten days of disciplinary removals. 34 C.F.R. §300.530(a)(2). Those services may be provided in an interim alternative education setting. §300.530(d)(2). The regulations do not provide examples of possible IAESs, but the commentary makes clear that the student's home can be an appropriate IAES. In response to a commenter who sought a ban on use of home instruction as an IAES, ED wrote:

> "Whether a child's home would be an appropriate interim alternative educational setting under §300.530 would depend on the particular circumstances of an individual case such as the length of the removal, the extent to which the child previously has been removed from his or her regular placement, and the child's individual needs and educational goals.
>
> …care must be taken to ensure that if home instruction is provided for a child removed under § 300.530, the services that are provided will satisfy the requirements for services for a removal under §300.530(d) and section 615(k)(1)(D) of the Act. We do not believe, however, that it is appropriate to include in the regulations that a child's home is not a suitable placement setting for an interim alternative educational setting as suggested by the commenter."
>
> "the Act gives the IEP Team the responsibility of determining the alternative setting and we believe the IEP Team must have the flexibility to make the setting determination based on the circumstances and the child's individual needs." *Commentary to 2006 IDEA regulations, p. 46722.*

In a discipline question and answer document, OSERS explains that the LEA must have at least one other placement option so the IEP Team has a choice. "May a public agency offer 'home instruction' as the sole IAES option? Answer: No. …it would be inappropriate for a public agency to limit an IEP Team to only one option when determining the appropriate IAES." *Questions & Answers on Discipline Procedures,* 52 IDELR 231 (OSERS 2009).

III. Online or Cyber Schools

A. Just because it's new technology does not mean it's accessible.

A lesson on visual impairments and book readers. On June 29, 2010, OCR issued a "Dear Colleague" letter directed at college and university presidents on the use of electronic book readers. *Dear Colleague Letter: Electronic Book Readers,* 110 LRP 37424 (OCR 2010). Electronic book readers or e-book readers "are handheld devices that allow users to read digital books and other materials by

displaying content on screens (often referred to as 'e-ink technology). Though features vary, e-book readers can hold a digital library of books, provide access to online content like newspapers and magazines, allow the user to highlight passages, look up word definitions, and link to reference materials." *Electronic Book Reader Dear Colleague Letter: Questions and Answers about the Law, the Technology, and the Population Affected* (OCR 2010). The letter comes on the heels of settlements between OCR, DOJ and four schools—Reed College, Princeton, Pace University and Case Western Reserve University—arising from their involvement in a pilot project utilizing Kindle DX electronic book readers. *USA Today, online edition, June 30, 2010.* The trouble was not the use of new technology, but the use of new technology that remained inaccessible to students with visual impairments. Specifically, the Kindle utilized in the pilot project lacked an accessible text-to-speech function. Wrote OCR **"Requiring use of an emerging technology in the classroom environment when the technology is inaccessible to an entire population of individuals with disabilities—individuals with visual disabilities—is discrimination" prohibited by the ADA and Section 504, "unless those individual are provided accommodations or modifications that permit them to receive all the educational benefits provided by the technology in an equally effective and equally integrated manner."** Note that students with disabilities must receive "all the educational benefits of the technology." *Book Reader Q&A, supra.*

What do the settlements require? The settlements require universities and colleges to refrain from purchasing, requiring or recommending the "use of the Kindle DX, or any other electronic book reader, unless or until the device is fully accessible to individuals who are blind or have low vision, or the universities provide reasonable accommodations or modification so that a student can acquire the same information, engage in the same interactions, and enjoy the same services as sighted students with substantially equivalent ease of use." **As a warning, OCR stated that "It is unacceptable for universities to use emerging technology without insisting that this technology be accessible to all students."** *Dear Colleague, supra.* As a practical matter, while the issue is framed here in the context of new technology, the same rule applies to old technology as well.

What about K-12 public schools? K-12 schools were not the target audience of this letter, but the message is nevertheless applicable. OCR notes that in 2006-2007, 29,000 students in elementary and secondary (ESE) students "had visual impairments, including blindness; about 2.6 million ESE students had a specific learning disability, which likely includes some students with a 'print' disability." *Book Reader Q&A, supra.* Further, school districts have made similar errors. For example, a North Carolina school district ran afoul of Section 504 by failing to make computers and some of its programs accessible to students with visual impairments. Among other similar errors, the district automatically tested all first graders for the Talent Development Programs, with the exception of visually impaired students, because the testing mechanism utilized by the school district had not been adapted to their needs. Visually impaired students were also denied access to part of the state curriculum, a Technology Standard Course of Study, when the district failed to provide screen-reader software on computers in classrooms and common areas of the school including the computer lab and Media Center. Screen-reader software was available only in the resource room. *Charlotte-Mecklinburg (NC) Schools,* 51 IDELR 196 (OCR 2008).

A little commentary: It should be no surprise that as schools move forward in their provision of more media in the classroom, or use technology to replace the classroom for student studying at home, those changes must be made with a recognition that students with disabilities have an equal right to participate and benefit. Just because a technology is cutting edge does not necessarily mean that it is ready, out of the box, for the benefit of all students.

B. Cyber Schools and Online Education

Public schools' provision of instruction in a learning environment where students are not in attendance in a classroom setting, and the teacher provides course content by means of course management

applications, multimedia resources, internet, video-conferencing, other alternatives, or combinations thereof, is a rapidly growing phenomenon. *See, for example,* Muller, *Virtual K-12 Public School Programs and Students with Disabilities: Issues and Recommendations* (NASDSE Policy Forum Proceedings Document, July 2010). NASDSE reports a 60% increase in K-12 online enrollment from 2002 to 2007, with current estimates of online enrollment of up to one million across the U.S. *Id*. at 1. The number of state-level virtual schools has also increased significantly over the last five years, with 15 virtual state-level schools and 12 states with K-8 virtual public school options. These new arrangements can create interesting disability law implications, a few of which are summarized below.

Equity and access issues for various types of students with disabilities. As schools expand their online instructional offerings, the issue of access and equity will arise naturally. *See, for example,* Rose & Blomayer, *Access and Equity in Online Classes and Virtual Schools*, Research Committee Issues Brief, North American Council for Online Learning. As part of the public schools' programs, online/virtual programs must be administered in a fashion that is not discriminatory on the basis of disability in order to not be in violation of Section 504 of the Rehabilitation Act. This does not mean that all students with disabilities have a right to participate in online programs—the IEP team must decide whether that can be an appropriate placement within which to implement the student's IEP. And, it is clear that for some students, online programs may not be able to meet their unique needs. Schools cannot, however, arbitrarily deny students with disabilities access to online programs, or design online programs in a way that will categorically exclude students with disabilities. This issue is likely to form the basis for litigation in the future, as parents become aware of, and interested in, virtual programs for their kids.

An additional access issue is the screening process for applicants to online programs. The screening process must be designed in a way that does not categorically or arbitrarily deny access to students with disabilities. Moreover, any screening process must be joined to the IEP team decision-making with respect to placement. Consider the following with your school attorney….

Where the online school is provided by the student's district of residence, the same district will have FAPE responsibility both before and after the change from the brick and mortar school to the online school. Consequently, the district, through the appropriate Section 504 Committee or IEP Team ought to consider whether the parent's choice to move place the student in the online school will deprive the student of FAPE. This review could take place upon the parent's application for the online program, or when the school learns of the parent's interest. Such a review could be added as an eligibility requirement for the resident district's online program. The review should include inquiries of the parents to determine their ability and willingness to perform a much-expanded role in their student's education (discussed below), together with an analysis of the student's impairments and need for services and supports (looking to current data) and a review of the nature and requirements of the cyber program (looking to the program description and program eligibility criteria). Consider the following questions as part of the review.

- Does the student exhibit the required degree of independence, initiative, motivation, and responsibility to receive FAPE through the online program?

- Does the online program's degree of ability to individualize instruction match to the student's needs?

- Are the student's parents aware of, and willing to undertake, the additional responsibilities of monitoring the student's work, assisting in organization of tasks, and ensuring the student is on-task a sufficient amount of time per day?

- Can the student's IEP goals and objectives be implemented in the online setting?

- Can the program implement the instructional accommodations required by the student's IEP or 504 Plan?

- Does the student demonstrate the minimum necessary proficiency on the computer and operating system?

- Will a staffperson be specifically designated to address any day-to-day problems?

- Does the online program have a set of policies addressing students with disabilities?

Should the results of this review convince the appropriate team or committee that the student could not receive FAPE in the online program, the Section 504 Committee or IEP Team could reject the placement pursuant to federal law. *See, for example, Douglas County, below*. A finding by the appropriate committee or team that FAPE can be provided to the student in the resident district's online program ought to be a required element for admission. Such a requirement would prevent the resident district from being required through choice to provide something less than FAPE to a Section 504 or IDEA-eligible student.

What if the online school is offered by an entity other than the resident district? It's a bit more complicated. Assuming that the resident school district is providing FAPE currently, it has no obligation under law to determine the appropriateness of a unilateral school choice by a parent in an entity other than the resident district. Consequently, it would be up to the entity providing the online program to determine whether the student meets eligibility requirements and whether, once accepted to the program, the student can be provided a FAPE there. Presumably, the online program district would want to conduct the same sort of review of the student data and program eligibility requirements outlined above, but would do so without the actual knowledge that comes from having served the child. With parental consent, the online program could access educational records of the student from the resident district. Further, with parental consent, the online program could also ask pertinent questions of the resident district's service providers to determine whether the online program would be appropriate. It would also be prudent for the online school to make inquiries into the ability and willingness of the parents to perform a much-expanded role in their student's education (discussed below). Should the student, based on an individualized review, be determined ineligible for the program because FAPE cannot be provided there, his application could be denied. Such a requirement would prevent the online program from being required through choice to provide something less than FAPE to a Section 504 or IDEA-eligible student.

Some additional thoughts with respect to Online Programs…

Students with motivational, social, or behavioral issues. While online methods can be highly effective, they can prove problematic for more dependent learners, or those with existing motivational or behavioral issues. *See, for example, Weaknesses of Online Learning*, Illinois Online Network, University of Illinois. The asynchronous nature of virtual programs give students greater flexibility and control over their learning experience, but also place greater responsibility on the student. Thus, some sources argue that virtual programs may not be appropriate for younger students or other students who are dependent learners and have difficulties assuming the responsibilities of virtual programs. *Id.*

Clearly, information on the student's level of self-motivation, ability to manage time, and skills in working independently play significantly in the decision of whether a virtual program is appropriate for the student. Or, the 504 Committee or IEP team may have to include safeguards in the program to ensure that the student is on-task and submitting his own work. This issue is likely to generate discussion and possible disputes, as parents of students who exhibit school refusal, attendance problems, or motivational issues at school may decide to have the student attempt online educational programs in lieu of traditional attendance. The problem is that this type of student may be one for whom an online program demands more self-responsibility and initiative than the student may

demonstrate. After a period of attempted online instruction without success, it may prove difficult to re-transition these students to a regular campus setting.

A related issue is the student with social skills deficits who seeks virtual instruction as the sole method for his education. The IEP team/Section 504 Committee must determine how social skills deficits will be addressed as part of the program, and whether it is even possible to meet this area of need in a virtual program. For some high-functioning students with autism spectrum disorder, for example, development of appropriate social skills can be a key aspect of their educational program and IEP. Although these students may be well adept at managing the technological aspects of the programs, and will avoid potential social conflicts and problems that present themselves at campuses, IEP teams/504 Committees might decide that such a program is detrimental to acquiring improved social skills.

Transfers of students between virtual and brick-and-mortar schools. The safest legal assumption to make is that a change from a brick and mortar program to a virtual program is a change in placement under the IDEA and Section 504, subject to IEP team/Section 504 Committee decision-making and prior written notice. Not only does the student attend school in a different manner, the nature of the program changes in terms of the student's role and the parent's role. The movement of students between traditional physical campuses and online/virtual programs can be tricky for schools to manage, and can lead to disputes, as the following case demonstrates:

> *Douglas County Sch. Dist. RE-1*, 109 LRP 32980 (SEA Co. 2009). After a student requested placement in an online charter school authorized by the District, the program allowed the student to participate in the online program by means of written work while her application was being processed, and while an IEP team convened to determine whether the program was appropriate to confer a FAPE. After the IEP determined that the program could not meet the student's needs for direct instruction with only consultative services in addition to the online program, the parent complained to the SEA. The SEA found that the District was required to ensure that FAPE was provided in the three-week period during which the application and IEP meeting process took place. Instead, the student had neither full access to the online program, nor to her required special education services. Thus, the student was entitled to 20 hours of compensatory education from a special education teacher (although the parent indicated she did not want such services, as the student was enrolled in another full-time online program).
>
> *A little commentary*: Here, the problem appeared to be that the District allowed the parent to go to the virtual school to enroll a child who was new to the District, as she resided in another. Instead of offering services comparable to her current school-based IEP in a campus setting while the online program application and IEP team decided if the program was appropriate for her, she was allowed to enroll in the online program although she could not access the computer system while her application was pending. The District could have insisted that the student attend school under a comparable services temporary program while the application was being considered. Or, if the parent wished, the student could have remained in her home district while the application process and IEP team meeting could be finalized. From a policy standpoint, an online school's policies should require that applying students remain in their resident district or assigned campus until the online program accepts the student and the IEP team has approved the placement.

Disputes over appropriateness of virtual instruction for providing a FAPE. The advent of virtual/online programs inherently creates the potential for placement disputes involving the new type of setting. In one case below, the parents of the student alleged insufficiency of one-to-one instruction in the virtual program, and challenged the scope of their role in the implementation of the program. In the second case, parents that had experienced problems and conflict in a physical campus setting wanted a virtual program, instead of the brick and mortar placement advocated by staff, but then complained about their expected role in the virtual program and technological problems that had to be addressed as part of the online program.

Benson Unified Sch. Dist., 56 IDELR 244 (SEA Az. 2011). An Arizona parent alleged that the online program provided by the District for her daughter with multiple chemical sensitivities failed to provide her a FAPE. The student qualifies under the IDEA as having an "other health impairment" (OHI). For a time, the student received homebound instruction by a teacher who followed a variety of protocols to prevent the student from being exposed to chemicals. At an annual IEP meeting, the team discussed the possibility of instruction through an associated online academy, and believed that the program could meet the student's needs. The parent disagreed, arguing that the online program did not provide sufficient one-to-one instruction and that neither parent was available to serve as "learning coach." In response the team added 6 hours of paraprofessional support in the home. The treating psychologist testified that he believed the online program was not appropriate because the student could not "self-motivate." The homebound teacher felt that the student was responsible and that requiring the student to do more work independently with the help of an online program would be beneficial. The Hearing Officer held that the online program, as individualized by the District, was appropriate for the student. The program could provide instruction with no printed materials whatsoever, and made available a certified teacher either online or in person. The paraprofessional, moreover, could fulfill the role of the "learning coach."

A little commentary: As seen by this case, disputes can arise between schools and parent regarding whether the student is sufficiently self-motivated to benefit from on online program, whether sufficient instructional assistance is provided, and with respect to the role the parent is expected to play in the virtual program.

Virtual Community Sch. of Ohio., 43 IDELR 239 (SEA Oh. 2005). Parents of a severely disabled low-functioning child with Down's Syndrome and associated impairments alleged that the virtual school district's program failed to provide an appropriate IEP or confer a FAPE. They sought reimbursement for the costs of a private placement. They complained of IEP deficiencies, failure to provide and properly maintain appropriate software and hardware, and failure to properly train staff. The parents left a previous school-based program and sought out an online program due to displeasure with aides and staff at the prior district. The student participated in the virtual program's "non-structured flexible program," where parents play a significant part in the program and function as the primary source of teaching. Everybody involved in the student's education, however, believed that he needed to be educated in a setting with other students and more intensive instruction and assistance. But, when the virtual school proposed a possible transition to a brick-and-mortar program, the parent expressed concern, based on past experience. In the process, the parents cancelled meetings and did not provide information regarding the student's progress, any difficulties, or concerns about the IEP. "Problems inherent in technology," including viruses, modem problems, changed passwords, and difficulties logging into the system were attended to promptly. And, the data indicated that the student made progress when he participated in the virtual school. Moreover, there was a unilateral withdrawal from the virtual school as of the date the student stopped completing any of the work from the virtual school and was merely logging in hours from the unilateral private placement, and providing no actual work product to the virtual school. The Hearing Officer thus denied reimbursement.

A little commentary: The Hearing Officer added that "FAPE delivered in a virtual school has a different method of operation and a different mechanism for the evaluation of its students…. **When parents elect to enroll their children in a virtual school they assume the responsibility of their new role as education facilitator and eyes and ears for the teacher."** [emphasis added]. The case illustrates the increased responsibility and role for parents in many virtual programs, as they help pace and sequence the program, monitor progress, assist with keeping the student on task, and spot problem areas. This is, in a sense, both a positive feature of virtual programs, as well as a possible source of conflict and problems.

Addressing the increased role of parents. In the *Virtual Community School of Ohio* case reviewed above, the Hearing Officer focused on the fact that parents in many online programs assume new roles as monitors and facilitators of their child's educational programs when they agree to participate in the

online program. The cases illustrate that this is an aspect of the placement decision that must be carefully considered by the IEP team in close collaboration with the parent. The parent must be clearly, carefully, and completely informed of their expected functions and duties as part of the program. Normally, parents play little or no role in the implementation of their child's IEP or 504 Plan in a physical campus setting, and have no legal responsibility to do so. If problems arise in a virtual program regarding parental duties, the IEP team or 504 Committee must meet to discuss the problems and brainstorm how the problems can be addressed. Note that in the *Benson* case (also reviewed above), the school had to add paraprofessional assistance when the parent indicated she could not meet the role of the "learning coach."

Related services: the need for some face-to-face services. No matter how well-designed and high-tech, some related services can simply not be provided meaningfully in an online context. Physical and occupational therapy, for example, are services that in most cases require physical contact from the therapist. Thus, for some students, their online instructional program will have to be supported by some measure of in-person services. As part of the IEP development process, schools must address and state the location of related services. *See* 34 C.F.R. §300.320(a)(7). The IEP team or Section 504 Committee must address whether the related services that must be provided in person will be provided at a school site or in the home. In a related vein, the therapists must address the need for services from a different perspective, as those decisions typically hinge on how the student will physically manage the brick and mortar environment, rather than an online setting.

Clearly identifying staff roles and responsibilities in implementing and monitoring the IEP or 504 Plan. In online programs, a greater degree of responsibility is placed on both the student and the parent. This is inherent in online instruction, as many programs are self-paced and the parent may have to help organize the instructional day and monitor whether the student is on-task and working a sufficient amount with the required diligence. Thus, it is crucial to establish what the school staff will do and what responsibilities and duties are placed on the student and the parent. Moreover, one key duty of school staff is to monitor the overall effectiveness of the program for the student, troubleshoot any potential problems in the student's role, and identify and address issues in the parent's role. The IEP team/504 Committee should address recurring problems with appropriate measures, including additional assistance to the student and parent as needed. If such measures are ineffective, the IEP team/504 Committee may have to decide whether the online program is an appropriate placement option.

Technology problems and the key role of technicians. In the case of *Virtual Community School of Ohio*, which was reviewed above, the parent complained that there were periodic problems with both the software and hardware components of the online program. The Hearing Officer noted that these are "problems inherent in technology," including viruses, down times, malfunctions, and other glitches. But, he found that the school addressed the problems promptly, and thus, there was no violation of the IDEA. Translated into the virtual realm, a legal argument that technology problems were not attended to in a timely or appropriate fashion can form the basis for a failure-to-implement claim if the facts show that the school was remiss in addressing the technological problems in a proper and timely fashion. Thus, the response time of technicians and technical teams will have legal implications in online programs. Schools must iron out all possible technical problems, and have sufficient technician resources to address day-to-day problems and malfunctions. In addition, notices must be provided to parents that misuse or non-educational use of the program software and hardware can exacerbate the potential for technical problems. Staff must document any parental non-compliance with technology use policies in case disputes later arise.

Managing the instructional "shift" in the way material is organized and delivered. An instructional challenge for teachers who deliver online instruction is shifting the manner in which material is organized and presented. This is likely as much a matter of practice and familiarity as it is of training. Campus administrators will undergo a parallel shift as they adjust their supervision and monitoring of instruction to a virtual context.

Need for certain degree of student computer literacy. Both students and staff will have to reach a minimum level of computer and operating system literacy to function within an online program. Some entry-level training may be necessary for some students to reach the required technical proficiency, while for others, the technical prerequisites to functioning in an online program may be too significant to overcome. Thus, a component of determining whether an online program is an appropriate placement for a special education student must be based on an assessment of their computer and operating system savvy.

IV. General Educational Development (GED) Credentials

A. What is GED?

"The Tests of General Educational Development are internationally recognized. They have been designed to measure major academic skills and knowledge in core content areas that are learned during four years in high school. When an adult passes the 7½ hour GED Tests battery, the resulting GED credential certifies that he or she has attained subject matter knowledge and skills associated with high school completion. The GED Tests battery includes the following subject area tests: Language Arts/Writing, Social Studies, Science, Language Arts/Reading, Mathematics." *Information Bulletin on the Tests of General Educational Development,*
http://www.education.ne.gov/ADED/pdfs/ GEDInformationBulletin.pdf

"The GED tests are administered in Nebraska only at official GED testing centers under the direction of the Nebraska Department of Education, Nebraska Adult Education section."
http://www.education.ne.gov/ADED/

"The Kansas Board of Regents is the official GED administrator for the state of Kansas."
http://www.kansasregents.org/ged_introduction

"Iowa's adult literacy program serves the literacy needs of the state's adult target populations through the state's fifteen community colleges. Iowa's Adult Basic Education, English Literacy & ELL, Family Literacy, and GED program areas help adults acquire basic educational skills."
http://educateiowa.gov/index.php?option=com_content&id=2040&Itemid=2131

B. GED & Special Education Services

1. What is the LEA's FAPE obligation for a student who withdraws to pursue GED?

> "[U]nder the Individuals with Disabilities Education Act (IDEA), the LEA is not required to provide students who have left traditional secondary education programs and entered a GED test preparation program, with special education services in the GED test preparation program unless the State considers the GED test preparation program to be a part of an appropriate secondary education." *Letter to Cort,* 55 IDELR 294 (OSEP 2010).

For an example of a GED program deemed part of secondary education, *See E.R.K. v. State of Hawaii Department of Education,* 113 LRP 34984 (9th Cir. 2013). "The GED program prepares students to take the GED test, a national standardized high school equivalency exam. Students who achieve adequate scores on the GED test qualify for a high school diploma if they have also completed at least one semester of high school work at either an accredited high school in Hawaii or a Community School for Adults. A high school diploma earned via the GED program permits students to seek admission to the University of Hawaii system." While the state argued that the differences between conventional high schools and the GED/adult education program were "so substantial that both school systems cannot offer secondary education, the 9th Circuit was unconvinced.

"Nothing in the IDEA, however, supports the proposition that a program constitutes 'secondary education' or 'free public education' only if it is structurally identical to the ordinary public high school curriculum offered to nondisabled students…. The record establishes that the Community Schools for Adults are nonprofit day schools that do not educate students beyond grade 12; only students who never graduated from twelfth grade can pursue a GED or CB diploma. And to the extent that Hawaii law substantively defines 'secondary education' at all, the GED and CB programs seem to qualify.").

2. What if the student changes his mind and comes back to the public school?

"If the GED test preparation program is not a part of secondary education in the State, and the eligible student re-enrolls in a regular high school program, the requirement to provide FAPE again applies. In any case, under 34 CFR § 300.102(a), the obligation to make a FAPE available to a student does not end until the student obtains a regular high school diploma or exceeds the State's maximum age of eligibility for FAPE, whichever comes first." *Letter to Cort, supra.*

3. Could the school include a GED test preparation program *as part* of a student's transition services?

Under the right circumstances, yes. "[N]othing in the IDEA prohibits an IEP Team from offering a GED test preparation program with special education supports as part of a transition program if the IEP Team, including the parent and the student, believes that such a program is the most appropriate program for the student, recognizing that achievement of a GED credential does not constitute graduation with a regular diploma and does not satisfy the LEA's obligation to make FAPE available until the student obtains a regular diploma or exceeds the upper limit of FAPE-age in the State, whichever occurs first." *Id.*

A little commentary: That looks like a big "if." Note also that OSEP's language does not seem to recognize that the GED preparation class *alone* can constitute an offer of FAPE.

4. Can the school use IDEA funds for special ed supports for a student in a GED program?

It's possible if the supports are provided pursuant to the IEP. "Under 34 CFR § 300.202(a), amounts provided to the LEA under Part 13 of the IDEA: (1) must be expended in accordance with the applicable provisions of Part 13; (2) must be used only to pay the excess costs of providing special education and related services to children with disabilities, consistent with 34 CFR § 300.202(b); and (3) must be used to supplement State, local, and other Federal funds and not to supplant those funds. Funds flowed through from the SEA to the LEA pursuant to the requirements of IDEA can only be used consistent with these requirements. Therefore, if the LEA chooses to provide special education supports to a student with a disability who is attending a GED test preparation program, such supports can be funded using IDEA funds, if the supports are provided pursuant to an IEP." *Id.*

5. Is a summary of performance required for a student who withdraws from school to pursue a GED?

"A public agency, pursuant to 34 CFR § 300.305(e)(3), must provide a child whose eligibility for services under Part B of the IDEA terminates due to graduation from secondary school with a regular diploma, or due to exceeding the age of eligibility for a free appropriate public education (FAPE) under State law, with a summary of the child's academic achievement and functional performance. This Part B requirement does not apply to the group of children who leave secondary school with a GED credential or alternate diploma and whose eligibility for services under Part B has not terminated. See 34 CFR § 300.102(a)(3)(iv), which clarifies that a regular high school diploma does not include alternate degrees, such as a GED credential." *Questions & Answers on Secondary Transition,* 57 IDELR 231 (OSERS 2011).